United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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ORIGINAL 74-1750

United States Court of Appeals

For the Second Circuit.

Docket Nos. 74-1750 and 74-1831

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

-against-

NORTH AMERICAN RESEARCH AND DEVELOPMENT CORP., EDWARD WHITE and ALFRED BLUMBERG,
Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF FOR APPELLANTS WHITE AND NORTH AMERICAN RESEARCH AND DEVELOPMENT CORP.

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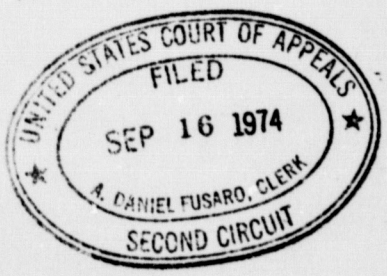

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 74-1750
74-1831

SECURITIES AND EXCHANGE COMMISSION

Plaintiff-Appellee

-against-

NORTH AMERICAN RESEARCH AND DEVELOPMENT CORP., EDWARD WHITE and ALFRED BLUMBERG

Defendants-Appellants

BRIEF FOR APPELLANTS WHITE AND NORTH AMERICAN RESEARCH AND DEVELOPMENT CORP.

JURISDICTION

The judgment of the United States District Court for the Southern District of New York was entered on March 26, 1974. Notice of appeal to this Court was filed on May 23, 1974.

CONSTITUTIONAL PROVISION and REGULATORY PROVISION INVOLVED

The United States Constitution

Fifth Amendment

"No person shall be....deprived of life, liberty, or property, without due process of law.

Federal Rules of Civil Procedure

Rule 65 (a) (2)

Consolidation of Hearing With Trial on Merits

Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

STATEMENT OF CASE

On September 26, 1967, the SECURITIES AND EXCHANGE COMMISSION (COMMISSION) filed a complaint and issued summonses against 43 defendants, seeking to enjoin the defendants from violations of the Securities Act of 1933 (15 U.S.C.A., §77 (b) and the Securities Exchange Act of 1934 (15 U.S.C.A., §78 (u) (e). There were some defaults and some consents to the entry of preliminary injunctions, and, finally, the Commission made a motion for a preliminary injunction against 21 remaining defendants, among them EDWARD WHITE and NORTH AMERICAN RESEARCH AND DEVELOPMENT CORPORATION (NARD).

On November 15, 1967, GLASS and GREENBERG, WHITE'S and NARD'S then lawyers, made a motion, under Rule 65, to consolidate the hearing with a trial. On November 15, 1967, JUDGE SYLVESTER RYAN denied the motion in a handwritten but unsigned order.

On January 3, 1968, a hearing on the Commission's motion for a preliminary injunction began before HON. WALTER R. MANSFIELD, then a District Judge (now a member of this Court). On January 17, 1968, the hearing was concluded and Judge Mansfield reserved decision.

During the hearing, WHITE'S and NARD'S lawyers, relying on Judge Ryan's denial of the Rule 65 consolidation, assumed that a trial for a final injunction would take place promptly. And, since they knew that the only requirement for the granting of a preliminary injunction was the establishment of a prima facie case, and since they assumed that the Commission would be able to do this, they felt no obligation to present their full, or their best, case.

On February 8, 1968, Judge Mansfield filed an opinion temporarily enjoining the defendants NARD and WHITE, but denying injunctions against several others. (280 F. Supp. 106). On February 28, 1968, the Commission filed a cross-appeal.

On May 18, 1970, this Court affirmed as against WHITE and NARD and reversed and remanded as against the seven defendants in whose favor Judge Mansfield had decided (424 F. 2d 63). After a hearing on the remand, the other seven defendants were also preliminarily enjoined.

The Commission did not, however, move the case for trial.

On February 29, 1972, the Commission made a motion for summary judgment against the only remaining defendants, WHITE, NARD and one ALFRED N. BLUMBERG, one of the defendants in whose favor Judge Mansfield had originally decided, who was by now appearing pro se.

On July 18, 1972, Judge Motley denied the motion as against WHITE and BLUMBERG and granted it against NARD.

The Commission then moved the case for trial and stated to HON. EDWARD WEINFELD, the Judge to whom the case had been assigned, that they proposed to proceed under Rule 65 (a) (2).

On April 26, 1973, WHITE and NARD made a motion before Judge Weinfeld for a de novo trial, stating that the defendants would be denied their Constitutional right to their day in Court, if the trial were to consist of a reading of the minutes of the hearing, which then seemed likely to happen.

This point was also argued to Judge Weinfeld on several other occasions, without formal motions.

On May 2, 1973, Judge Weinfeld denied the motion.

On June 27, 1973, the trial took place. The Commission produced no witnesses, but, fortuitously the defendants WHITE and BLUMBERG were in Court and the attorney for the Commission called them as his witnesses.

On March 8, 1974, Judge Weinfeld filed an opinion granting a final injunction.

On May 23, 1974, the defendants, WHITE and NARD filed notices of appeal to this Court.

QUESTION PRESENTED

Whether the defendants were denied their right to a trial, and thus deprived of property without due process of law, in violation of the Fifth Amendment, when, after they had moved under Rule 65 for a consolidated hearing and trial, and the motion had been denied, they were required, almost six years later, to submit to a Rule 65 "trial", a trial based on the preliminary hearing testimony?

SUMMARY OF ARGUMENT

We can assume that when the defendants' lawyer moved for a consolidated hearing and trial under Rule 65, he had in mind a full plenary hearing. And we can further assume

that when the motion was denied, believing that a full trial would soon follow, the lawyer changed his strategy and tactics and decided not to put in his full, or his best, case. This is so routine as to require no comment.

The Government's purpose in this case and in all such cases is to enjoin the alleged statutory violations permanently--and not only temporarily. Normally, a trial would have followed the hearing speedily. Allowing for the time consumed by the appeal here, the Government nevertheless permitted two years more to elapse before trying to get a disposition--and then, because they had no new witnesses or additional information justifying the issuance of a permanent injunction, they tried to avoid a trial by moving for summary judgment. When Judge Motley denied summary judgment, they had no choice but to proceed to trial, but, the trial they had in mind was a cold rereading of the preliminary hearing testimony.

When, therefore, a "trial" took place almost six years later without a single new word of evidence--putting aside the fortuitous presence of the defendants in Court and

their testimony--this deprived the defendants of a Constitutional right to a trial, a day in Court.

The efficiency which Rule 65 was intended to accomplish was to consolidate the hearing and the trial into one session--not to separate the hearing and the trial into two sessions--six years apart, so that the "trial" became a re-reading of the preliminary hearing testimony.

ARGUMENT

POINT

THE DEFENDANTS WERE DENIED THEIR RIGHT TO A TRIAL AND THUS DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT, WHEN, AFTER THEY HAD MOVED UNDER RULE 65 FOR A CONSOLIDATED HEARING AND TRIAL, AND THE MOTION HAD BEEN DENIED, THEY WERE REQUIRED, ALMOST SIX YEARS LATER, TO SUBMIT TO A RULE 65 "TRIAL", BASED ON THE PRELIMINARY HEARING TESTIMONY.

The manifest purpose of Rule 65 (a) (2) is the efficiency resulting from a consolidation of two judicial proceedings into one. When, therefore, consolidation is granted, the Judge will treat the hearing as a trial, will exclude hearsay and other inadmissible evidence, and will reach a final, not a temporary, conclusion. When consolidation is denied--or not ordered--as in this case--the Judge needs to find only a prima facie case in order to grant temporary--not final--relief.

This is a huge difference.

Judge Frank, describing the nature of a preliminary hearing in HAMILTON WATCH CO. v. BENRUS WATCH CO., 206 F. (2d) 738, 742, (2d Ct. 1953) said:

> "The judge's legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation. For a preliminary injunction--as indicated by the numerous more or less synonymous adjectives used to label it--is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness."

It is, therefore, clear that when the hearing is only a hearing, the Judge has a tendency to be more flexible and more lax in admitting evidence. Indeed, a temporary injunction can be granted on affidavits alone--and without any testimony at all. But a final injunction requires a "full reconsideration after a plenary hearing" (SUTTON COSMETICS (P.R.) v. LANDER CO., 455 F 2d 285 (2d Ct. 1972).

This hearing, of course, could have been consolidated with the trial. Indeed, White's lawyer requested a consolidation by a written motion in advance of the hearing. We do not know why Judge Ryan denied the motion, but he did. And no one at the hearing made the request. The lawyers--certainly White's lawyer,--had every reason to believe, therefore, that

since there was not going to be a consolidation, and since the only thing the Commission would have to do was to make out a prima facie case--which it was expected to be able to do--they could hold their fire until the trial.

And the only thing that was proved was a prima facie case, as Judge Mansfield clearly noted in his decision.

That the defendants' position at the hearing was a reasonable position has been held by this Court in CAPITAL CITY GAS CO. v. PHILLIPS PETROLEUM CO., 373 F. (2d) 128 (1967). There the Court, vacating a permanent injunction, said:

> "Of course the judgment order cannot be permitted to remain in force as a permanent injunction; Phillips has a clear right to have a full hearing on the merits of the complaint, for the order was granted upon a hearing noticed for a temporary injunction only, and no warning was given to the parties that a permanent disposition of the case was likely." (Emphasis in all cases added)

The Court went on to distinguish between a preliminary hearing and a trial, saying:

> "The noticed hearing upon temporary relief was never consolidated with a trial on the merits for permanent relief although the

Court considered evidence put in by both parties. As pointed out above, the parties were not made aware that final relief was to be granted. Because of the different scope of possible relief, the difference in types of evidence admissible, and the difference in burden of proof required, compare Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738, 740 (2nd Cir., 1953) with Allen v. Pyrene Mfg. Co., 111 F. Supp. 819 (D.N.J., 1953), between permanent and temporary injunctive relief, a party is entitled to notice that permanent rather than temporary relief is being determined. Since Phillips was not given such notice in this case, the permanent injunction must be vacated."

The Court of Appeals in the Seventh Circuit has taken the same position, in PUGHSLEY v. 3750 LAKE SHORE DRIVE COOPERATIVE BUILDING, 463 F 2d 1055 (7th Ct., 1972):

"If a consolidation of a trial on the merits with a hearing on a motion for a preliminary injunction is to be ordered, the parties should normally receive clear and unambiguous notice to that effect either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases.

. . . . . .

Different standards of proof and of prepar-

ation may apply to the emergency hearing as opposed to the full trial."

The Court of Appeals in the Fourth Circuit has also taken the same position, in NATIONWIDE AMUSEMENTS, INC. v. NATTIN, 452 F. (2d) 651 (4th Ct., 1971).

> "We realize that a number of witnesses appeared for appellant, that the case was developed in some detail, and that the issues presented by the motion for preliminary injunction were similar if not the same as those raised for final determination. Nevertheless, we are concerned that appellant may have been denied his full day in court...."

MOORE makes the same point about the necessity of the "day in court":

> "What is required is that the parties be given a full opportunity to present evidence in the case. At a hearing on application for a temporary injunction it is not necessary to establish to a certainty that the plaintiff is entitled to relief on the merits, but rather that his success is probable. A plaintiff putting on his case for temporary relief may hold back evidence, or, indeed, his case may not be fully developed. Thus it is important for him to know that when he puts on his evidence he is having his final "day in court." 7 Moore's Federal Practice, §65.04 (4)

That this is plainly the law cannot be challenged, and if Judge Mansfield had granted a permanent injunction based on the testimony at the hearing, it would have been beyond his power and clearly reversible error.

When Judge Weinfeld granted a permanent injunction almost six years later--on the same testimony, except for a trivial addendum, which we will discuss later--it was just as much beyond his power and just as clearly reversible error.

It is not the purpose of this brief to challenge the correctness of Judge Mansfield's decision, which held only that "a strong prima facie case" had been established by the Commission.

Nor is it our purpose to argue the merits of this Court's decision, partially affirming and partially reversing Judge Mansfield. While this Court, of course, has the power, in an appeal from the granting of a preliminary injunction, to reverse the District Court for "clear error or abuse of discretion" (YOUNG v. MOTION PICTURE ASSOCIATION OF AMERICA, INC., 299 F. 2d 119 (D.C. Ct. 1962) it does not have the

power, in such an appeal, to determine the merits of the case finally.

The function of a Court of Appeals in reviewing the granting of a temporary injunction is set forth in MESABI IRON CO. v. RESERVE MINING CO., 270 F. 2d 567 (8 Ct. 1959)

> "We recognize that the established rule, under an appeal from a decree for a preliminary injunction, the appellate court ought not to determine crucial questions conditioning the merits of the case; (1) Because their adjudication of such questions ought not to be made until after the parties have had an opportunity to present their evidence and their arguments upon the entire proof; (2) because such an adjudication would not estop any of the parties in the subsequent trial of the issues of the case or otherwise; and (3) because such a decision could in many cases be made on a different state of facts and upon different arguments from those presented at the final hearing....

See, also, the strictures against transforming "the court of appeals into a district court for the purposes of deciding the merits of the controversy in the first instance" (RAILROAD YARDMASTERS v. PENNSYLVANIA R.R. CO., 224 F. 2d 226, (3 Ct. 1955).

In DOESKIN PRODUCTS v. UNITED PAPER CO., 195 F. 2d 356, (7 Ct. 1952) the Court said:

> "A question going to the merits of a case cannot be decided by us on appeal from an order granting an interlocutory injunction.
>
> As said in Meiselman v. Paramount, 4 Cir. 180 F. 2d 94, 96, "It is well stated that an application for an interlocutory injunction may not be availed of to secure a piecemeal trial nor as a means whereby an opinion as to the applicable law may be extracted from the appellate court in advance of trial hearing. Advantageous though this might be to the parties in some cases, the proper administration of justice require...that the appellate court have the case completed before it when it declares the law applicable thereto."
>
> The decision of the trial court in granting the motion for preliminary injunction will not estop either of the parties or the trial of the case on its merits, nor would any determination of those questions by this court on appeal be binding on the trial court nor upon either of the parties in considering and determining the merits of the controversy."

See also:

BENSON HOTEL CORP. v. WOODS 168 F. 2d 694 (8 Ct. 1948)

IMPERIAL CHEM. IND. LTD. v. NATIONAL DISTILLERS AND CHEM. CORP., 354 F. 2d 459 (2d Ct. 1965)

BURSTEIN v. PHILLIPS, 351 F. 2d 616 (9 Ct. 1965)

But the hearing on the remand which resulted from this Court's decision reversing Judge Mansfield's exoneration of seven of the defendants, did produce a colloquy between the Judge and the Commission's counsel which ineluctably strengthens our position. The remand took place on June 30, 1970, and the colloquy follows:

THE COURT (JUDGE MANSFIELD): Now, let me ask you this, Mr. Deitz:

You said something about wanting permanent relief as distinguished from preliminary relief.

MR. DEITZ: Well, we intend to press the case to a judgment on permanent injunction.

THE COURT: Is there any further evidence that you wish to offer?

MR. DEITZ: As concerns the preliminary relief?

THE COURT: Permanent relief.

MR. DEITZ: Yes, your Honor.

THE COURT: There is?

MR. DEITZ: Yes, there will be.

THE COURT: When do you want to offer it?

MR. DEITZ: We expect that there will be probably a somewhat more protracted trial at some later time. We are not prepared now to offer that evidence. We have submitted what we feel to be a complete case for the granting of preliminary relief.

THE COURT: Well, all right, then it is out of my hands. I don't have this case then if that is what you want to do. But I don't understand you. Do you want to convert this into a lifetime operation?

MR. DEITZ: No, your Honor, we are attempting to advance this case.

THE COURT: What happens to all this record and the evidence that I have received and appraised and considered? Are you now going to throw out of the window and start over?

MR. DEITZ: No, this will be accepted in evidence for the final injunction.

THE COURT: All right, if that is the way you want to proceed, that is the way you want to proceed. It strikes me as a kind of inefficient method of proceeding. We have only so many judges here and so many courtrooms, and now you want to have a permanent injunction trial. Is that what you would like? What have you got that's new? Is it a wholly new case?

MR. DEITZ: No, your Honor, but there is certain evidence, certain facts, which were submitted to your Honor and which might not be acceptable under the rules of evidence which apply in a trial for permanent injunction, which would be able to considered by your Honor for preliminary relief. To that end it would be necessary to convert--

From all of this it follows that the Commission should have brought the case on for an immediate trial. Indeed, justice required it. See WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 2950:

> "If a Rule 65 (a) injunction is granted, a speedy trial minimizes the potential adverse effect of what may prove to be an unjustified restraint on defendant....
>
> . . . . . .
>
> ....The urgency that is characteristic of cases involving preliminary injunction applications makes a rapid determination on the merits especially important.

But the Commission waited for more than two years after this Court's affirmance and did not move the case for trial. And then, because they had in fact no "further evidence.... to offer....which would be acceptable under the rules of evidence which apply in a trial for permanent injunction" (DEITZ) and they were afraid that they could not succeed on a trial, they decided to circumvent this risk by moving for summary judgment. But Judge Motley denied the motion as against WHITE.

Since likelihood of future repetition of the allegedly violative conduct is one of the criteria of the <u>need</u> for a permanent injunction, it is significant to note Judge Motley's comment that "it appears that defendants have not dealt in NARD stock since 1967 or distributed the misleading report since 1968."

Judge Motley, in denying the motion for summary judgment, also considered the "day in court" concept, saying that there was a "due process requirement that the parties should not be foreclosed on the merits by a hearing that expressly addressed only preliminary questions, and at which parties may not have presented their best possible case. Here defendants were rightfully entitled to expect that they would have a further day in court."

Dented, but undaunted, by Judge Motley's denial of summary judgment, and despite the knowledge that they had no further evidence and were not going to be able to prove any violative activity by the defendants for more than five years, the Commission now moved the case for trial. But, still afraid of plenary trial, they moved the case for "trial" under Rule 65, stating that they intended to go forward on the basis of the testimony of the preliminary hearing.

By this time, the case had been assigned to Judge Weinfeld, and we attempted to resist this manifestly shelter-seeking maneuver by moving for a de novo trial. And although

the Commission's counsel had told Judge Mansfield at the hearing on remand that he had "further evidence that (he wished) to offer" and that some of the evidence submitted at the hearing "might not be acceptable....in a trial for permanent injunction", all of this was now jettisoned and the Commission's position, as stated in its brief in opposition to our motion, became the following: That while we would have the "opportunity to call witnesses or present any other evidence", they were under no such duty, and that

> "The presentation of the evidence, however, insofar as the Commission is concerned, will consist primarily of the record adduced at the hearing on the Commission's motion for preliminary injunction...."

Apparently agreeing with the Commission's position, Judge Weinfeld denied our motion.

THE "TRIAL"

The "trial" produced no surprises. The Commission did not have, and therefore did not offer, any further evidence, and if the defendants White and Blumberg had not been in Court, the trial would have consisted of the Commission's counsel offering the record of the hearing in evidence and resting.

Then, we would have rested, and the Judge would have retired to his chambers to read the record. That would have been the "trial".

Indeed, the transcript of the trial discloses that the record was not offered in evidence, so that we must assume that it was not necessary and that, under the Rule, any evidence in the hearing which would be admissible upon a trial on the merits automatically became a part of the record.

The Advisory Committee Notes state that "This evidence need not be repeated at the trial. On the other hand, repetition is not altogether prohibited....So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction."

It is our position, of course, that in this case, since almost six years had passed, and since there was a different judge and since a de novo trial had been denied, the least we were entitled to was a complete re-reading of the record, so that proper objection could be taken to the admittedly in-

admissible evidence which had entered the hearing. Denied this, the defendants were in every real sense denied a trial, and thus deprived of property without due process of law, in violation of the Fifth Amendment.

See 81 HARVARD L. R. 591, 610:

> "But there should be no undue strain to avoid repetition. Repetition may be desirable and even vital when finer details of proof are needed on trial than on the preliminary injunction, when there is a gap of time between the two proceedings and hence a loss of immediacy of impression or when the two proceedings are heard by different judges."

See, also, MOORE, §65.04 (5).

The trial started by a statement by Lorance Hockert, an associate of Glass and Greenberg, attorneys of record for NARD, that the defendant White had asked his firm to withdraw as counsel for the corporation, and by a statement by White that he wanted to substitute SIDNEY SCHREIBERG, his counsel, as counsel for the corporation and that he, White, wanted to represent himself. Judge Weinfeld refused to permit this substitution, "in the absence of a proper substitution or a stipulation...." (TR. 5)

And then counsel for the Commission, the same

ROGER M. DEITZ who had told Judge Mansfield that he had further evidence, called the defendants Blumberg and White as his only witnesses.

The only purpose of this could have been to elicit proof of violations of the preliminary injunction--which, of course, had not happened--or some evidence of danger of future violations--which Judge Weinfeld, in his opinion, did find. We will comment on this in a moment.

At the end of the trial, Judge Weinfeld instructed Mr. Deitz, the Commission's counsel as follows:

> "I will afford you an opportunity to submit a brief....Pinpoint with respect to each defendant who still remains in the case the evidence upon which the Government relies in urging a permanent injunction, first, violation of the act, and second the basis upon which it urges its claim for a permanent injunction...."(Tr. 123)

And again:

> "I went over your brief this morning but I think that you want to supplement it.... I am suggesting that your brief should be directed to the basis, the factual basis upon which you claim violation of the statute by the defendants who still remain on trial and also the basis upon which you seek the permanent injunction."(Tr. 126)

The brief which was submitted did not pinpoint anything, any single fact of violation of the statute or any basis for a permanent injunction. The brief was a re-hash of the brief which the Government had used in its motion for summary judgment and which Judge Motley had found insufficient. If the brief had "pinpointed" anything in the record, we could have responded to it. As it was, our brief could only say, on this point, what we have said here.

THE OPINION

In view of our position, we will refrain from commenting upon the opinion as a whole--except to reject it as being based on a non-trial--and will simply quote several passages from it, and comment upon them.

> 1. "In September 1972, Judge Motley granted summary judgment against the corporation....

Comment: One would never know from this statement that the basis of Judge Motley's ruling against the corporation was, as she stated in her opinion, the following: "The Hockert affidavit does not contest the facts found by Judge Mansfield and repeated in the SEC's affidavit or the contentions that

these defendants (NARD) violated the securities laws. Summary judgment is therefore granted for the SEC on these items." (Hockert, by the way, wrote the affidavit as NARD's attorney and is the attorney whom White attempted to discharge at the commencement of this trial, and whose dismissal Judge Weinfeld refused to accept.)

One would also never know from this statement that Judge Motley had denied summary judgment against White because his "affidavit disputes both the question of his conduct in 1967 and the present need for an injunction."

> 2. "Plaintiff at the trial, pursuant to Rule 65 (a) (2) of the Federal Rules of Civil Procedure...
>
> Comment: (There is no mention of the fact that there had been objection to this procedure, which had been overruled.)
>
> . . . . .
>
> 3. "relied in large measure upon the substantial testimony of the twenty-four witnesses who testified...
>
> Comment: ("In large measure" is hardly accurate. "Entirely" would be more so.)

. . . . .

4. "...and the numerous exhibits admitted in evidence during the seven-day hearing before Judge Mansfield on the motion for preliminary injunctive relief. This court has read and studied the voluminous transcript of that hearing"

Comment: The defendant Blumberg, appearing pro se, makes the point in his brief that, in preparing his appeal, he discovered that the exhibits were not in the District Court file, or other places where Judge Weinfeld, at Blumberg's request, suggested that he might find them, and that therefore Judge Weinfeld could not have read them, and that the record, at least in this respect, was not complete.

. . . . .

5. "Plaintiff, in addition to the admissible evidence of the prior proceeding..."

Comment: This is an oblique admission that there had also been inadmissible evidence which had been received by Judge Mansfield. Indeed, this had been admitted by the Commission's counsel

. . . . .

6. "called at this trial as witnesses defendants Blumberg and White...

Comment: (They were not subpoenaed and, had they not fortuitously been in Court, the Commission would have produced no witnesses.)

> 7. "This court, too, has had the opportunity to observe the demeanor of the two defendants White and Blumberg. Each impressed this court as evasive and at times non-responsive, with a quick and glib explanation for questioned conduct..."
>
> . . . . .
>
> "White continues to maintain a stubborn, even defiant attitude that the North American securities are exempt under Section 3 (a) (1) of the 1933 Act and also as to the probity of the Progress Report, despite express determinations by the Court of Appeals to the contrary..."
>
> . . . . .
>
> "Nothing in the record as to the current defendants suggests recognition of the wrongfulness of past illicit conduct or offers the promise of future compliance with the securities laws. Under the circumstances a permanent injunction against future violations of the securities acts is justified."

Comment: The Supreme Court, in UNITED STATES v. W. T. GRANT CO., 345 U. S. 629 (1952) has considered--and rejected--this reasoning.

"An individual proclivity to violate the statute need not be inferred from the fact that three violations were charged... the District Court was not dealing with a defendant who follows one adjudicated violation with others.

. . . . .

How much contrition should be expected of a defendant is hard for us to say."

8. "As to the North American stock,... there can be no serious question that plaintiff is entitled to...injunctive relief...

As to other securities, the defendants' past actions and their pervasive conduct with respect to North American, which furnishes a clue to their general attitudes, justify such relief."

Comment: (Other than the defendants' actions relating to North American stock--which Judge Weinfeld did indeed find violated the statute--there was not a word of proof concerning improper dealings in any other stock. Nor does the complaint in the case mention or complain about any other stock. Neither law nor equity, therefore, justifies a restraint as broad as the one ordered by Judge Weinfeld.)

CONCLUSION

The essence of our position is that Rule 65, as applied to the facts of this case, was--with due respect--misread by Judge Weinfeld.

The fact situation here involved is of first impression. We have been able to find no case even remotely resembling a preliminary hearing and a "trial" separated by almost six years, and we respectfully urge that Judge Weinfeld's formalistic view of Rule 65 was erroneous, and resulted in a denial to the defendant's of their Constitutional right to a trial.

What happened here was that a hearing took place in 1968 which was not consolidated with a trial--consolidation having been demanded and denied--and that that hearing--with no notice to the defendants that it would be their final day in Court--became the basis for a final injunction.

The lack of notice at that time is the key to this case.

It is legally insignificant to this argument that Judge Weinfeld, in 1973, in denying our motion for a de novo

trial, gave notice that a trial on the merits would take place or that, as he said in a footnote to his opinion, "The defense at this trial was, of course, free to call any witnesses or offer any additional evidence, but failed to do so."

But this misses the point. The burden of proof was on the Commission--at the preliminary hearing, to prove a prima facie case--and at the trial, to prove much more, including the need for permanent relief--and disregarding for the moment, the fortuitous presence in Court of the defendants White and Blumberg, the Commission proved nothing. The "trial"--if White and Blumberg had not been there--would have amounted to Judge Weinfeld's reading of the state record in his Chambers. This is not a trial.

The judgment should be reversed and the case sent back for a real trial.

Respectfully submitted

SIDNEY SCHREIBERG
Attorney for Appellants
WHITE and NORTH AMERICAN
REASEARCH AND DEVELOPMENT
CORPORATION

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 16 day of Sept. 1974 deponent served the within Brief upon William Moran Glass + Granberg

attorney(s) for Appellee

in this action, at 26 Federal Plaza + 540 Madison Ave. N.Y.C. N.Y.C.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
16 day of Sept. 1974

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976